BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANA MABEL GARAY Claimant	)	
VS.	)	
MCCRITE PLAZA RETIREMENT COMM. Respondent	)	Docket No. 1,000,191
AND	)	
KANSAS HEALTHCARE ASSN. WCIT Insurance Carrier	)	

ORDER

Claimant requests review of the Order denying claimant's request for penalties entered by Administrative Law Judge Bryce D. Benedict on March 28, 2002.

ISSUES

This is an appeal from the Administrative Law Judge's Order denying claimant's request for penalties against the respondent for failure to pay temporary total disability compensation in a timely manner. The Administrative Law Judge denied penalties because the statutory demand letter was sent before the Judge had issued his written order granting the temporary total disability compensation.

The sole issue raised on review by the claimant is whether the Administrative Law Judge erred in denying penalties pursuant to K.S.A. 44-512a. Claimant notes that at the conclusion of the preliminary hearing the Administrative Law Judge ruled from the bench and ordered temporary total disability compensation. Claimant argues the demand letter sent that same day accurately specified the amounts due from the oral ruling by the Judge and later memorialized in the written order. In addition, claimant argues the insurance carrier received the claimant's demand letter on the same date the written Order was effective.

Conversely, respondent argues the claimant's statutory demand letter, pursuant to K.S.A. 44-512a, was premature because when the demand letter was sent the

Administrative Law Judge had not issued an effective Order and there was no temporary total disability compensation due to the claimant.

FINDINGS OF FACT

Having reviewed the entire evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The facts are undisputed. At the conclusion of the preliminary hearing held on January 9, 2002, the Administrative Law Judge, in comments from the bench, noted that he would order respondent to provide claimant temporary total benefits from November 1, 2001.

On that same date, January 9, 2002, claimant sent respondent's insurance carrier and its attorney a 20-day demand letter by certified mail. The letter stated, in pertinent part:

> Pursuant to the Order issued from the Bench by Administrative Law Judge Bryce D. Benedict on January 9, 2002, this is to demand temporary total disability at the rate of $200.01 per week from November 1, 2001. As of January 10, 2002, there are ten weeks back due in the amount of $2,000.10.

On January 10, 2002, the Administrative Law Judge issued his written Order which included an award of temporary total disability compensation at the rate of $200.01 per week, commencing November 1, 2001.

Respondent's attorney received the claimant's demand letter on January 10, 2002, and respondent's insurance carrier received the claimant's demand letter on January 11, 2002.

On February 12, 2002, claimant filed an Application for Penalty. By check dated February 27, 2002, and received by claimant's counsel on February 28, 2002, the respondent paid all the temporary total disability compensation due to the claimant.

At the penalty hearing the claimant argued that while the demand letter may have been technically premature it nonetheless accurately specified what was ordered by the Judge from the bench and later confirmed in the Judge's written Order on January 10, 2002. In her brief to the Board, claimant additionally argued the demand letter was received by the insurance carrier on the same date the Judge's written order became effective.

Conversely, respondent argued that although the Judge indicated from the bench what the order would likely be, nonetheless, compensation was not ordered until the written decision and therefore, the written demand was premature.

The Administrative Law Judge, in an order dated March 28, 2002, denied the request for penalties. The Judge ruled that at the time the claimant's demand was sent an enforceable order had not been entered.

CONCLUSIONS OF LAW

This is an appeal from the Administrative Law Judge's decision which denied claimant's request for penalties against the respondent. The Board has jurisdiction to review this Order because a decision in a penalty proceeding is treated the same as a final award and is not a preliminary hearing order as contemplated by K.S.A. 44-534a. See Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993).

Initially, the Board must determine whether the Administrative Law Judge's comments at the conclusion of the January 9, 2002, preliminary hearing constituted an effective order. K.S.A. 44-525(a) provides in pertinent part:

> Every finding or award of compensation shall be in writing signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. The award of the administrative law judge shall be effective the day following the date noted in the award.

The foregoing statute specifically requires that every finding of an Administrative Law Judge shall be in writing and signed by the Judge. In addition, the statute specifically provides the effective date of the decision shall be the day following the date noted in the decision. Accordingly, the comments made from the bench by the Administrative Law Judge did not constitute an effective Order until written, signed and dated. Moreover, the effective date is the day following the date the decision is signed. Herein, the effective date of the Administrative Law Judge's preliminary decision was January 11, 2002.

Next, it must be noted that claimant's written demand was for temporary total disability compensation from November 1, 2001. Or stated another way, the demand letter requested temporary total disability compensation for time periods before the date of the preliminary hearing.

K.S.A. 44-534a(a)(2) provides in pertinent part: "If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical

compensation and temporary total disability compensation from the date of the preliminary award."

The word "from" as contained in the phrase "from the date of the preliminary hearing award" is a preposition which is used to indicate a particular time or place as a starting point. Webster's II New College Dictionary (1995). It is the Board's finding that the starting point in the subject sentence is the date of the preliminary hearing order as plainly stated. Accordingly, the Board concludes that because benefits awarded in a preliminary hearing order are not stayed from the date of the preliminary hearing order when appealed then, by implication, benefits awarded prior to the date of the preliminary hearing order are stayed during the pendency of such appeal.

K.S.A. 44-551(b)(1) states: "All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days." The 10-day appeal time applies to preliminary hearing orders.

An appeal from the preliminary hearing order would stay the temporary total disability compensation benefits awarded for time periods prior to the date of the preliminary hearing order. Because the claimant's demand was only for the benefits awarded for time periods prior to the date of the preliminary hearing order, those benefits did not become due and payable until the 10-day appeal time passed.

When computing the 10-day appeal time, K.S.A. 44-551 excludes Saturdays, Sundays and holidays from the computation of the days. Therefore, with an effective date of January 11, 2002, the 10-day appeal time to the Board would conclude January 28, 2002.

K.S.A. 44-512a states in pertinent part:

> In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than $100 per week for each week any disability compensation is past due . . . if: (1) Service of written demand for payment, **setting forth with particularity the items of disability** and medical **compensation claimed to be unpaid and past due**, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand. (Emphasis added).

In Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185, rev. denied 251 Kan. 942 (1992), the Court noted:

> Before a penalty may be imposed, the statute essentially requires (1) an award of compensation which is due and payable, but has not been paid, (2) service of a written demand for payment, and (3) the passage of 20 days from the service of demand without payment of the compensation due. 17 Kan. App. 2d 198.

The Board finds claimant's written demand served on the respondent's insurance carrier on January 11, 2002, was ineffective to predicate an action for penalties under K.S.A. 44-512a because the requested temporary total disability compensation was not then due. *See* Hallmark v. Dalton Construction Co., 206 Kan. 159, Syl. ¶ 2, 476 P.2d 221 (1970).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated March 28, 2002, is affirmed in accordance with the foregoing.

IT IS SO ORDERED.

Dated this _____ day of May 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director